Nos. 04-805 and 04-814

MOTION FILED
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IN THE

Supreme Court of the United States

TEXACO, INC.,
Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,
Respondents.

SHELL OIL COMPANY,
Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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January 13, 2005

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the

Petitioners. Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for Respondents declined to give consent, thereby necessitating this motion.

WLF is a public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States Tobacco Co. v. Conwood Co., cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003).

WLF is concerned that the decision below, if not reviewed by this Court, would create excessive uncertainty in joint ventures by establishing *per se* antitrust liability for normal and legitimate business decisions. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

Respectfully submitted,

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January 13, 2005

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] The interests of the *amicus* are set out in the motion for leave to file accompanying this brief.

ARGUMENT

I. This Case Presents A Sound Vehicle For Addressing The Application of Sherman Act § 1 to Joint Ventures.

In their Opposition, Respondents argue that the facts of this case do not present the question advanced by the Petitioners – namely, whether it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a lawful, economically integrated joint venture to set the selling price of its own products. Opp. at 9-13. But this question is, in fact, squarely presented here. The factors cited by Respondents with regard to the joint ventures created by Shell and Texaco (*i.e.*, Equilon in the Western U.S. and Motiva in the Eastern U.S.) are simply attributes of joint ventures in general.

The Federal Trade Commission approved the formation of the two joint ventures. Pet. App. 3a. The courts below correctly determined, based on the undisputed evidence, that the entities are *bona fide* joint ventures. The district court observed:

> Several undisputed facts appear to foreclose the conclusion that Equilon and Motiva are nothing but window-dressing for an old-fashioned price fixing cartel or are otherwise patently anticompetitive. Though the parties dispute the exact extent of integration, both

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

> ventures control significant refining and marketing assets. Both entail risk sharing based on the Defendants' respective capital investments. Both have in fact achieved cost savings. . . .

Pet. App. 40a-41a.

The district court also cited undisputed evidence of the Defendants' expectation of benefits from greater economies of scale and from the sharing of best practices and technologies. Pet. App. 41a-42a.

The Court of Appeals itself acknowledged that the Defendants determined before creating the joint ventures that they would bring about extensive synergies and efficiencies with cost savings of up to $800 million annually. Pet. App. 3a.

Respondents' Opposition acknowledges that Texaco and Shell integrated their former gasoline marketing and refining operations into the joint ventures and that the parent companies no longer competed in the United States at the wholesale and retail level. Opp. at 5, 10.

Respondents nonetheless argue, as did the Court of Appeals, that the pricing here "was not a decision made by a single economic entity – it was a decision made by competitors." Opp. at 9. But the factors that Respondents rely on are commonplace characteristics of joint ventures; some are even inherent in the nature of a joint venture. One treatise defines a joint venture as follows:

> The elements of a joint venture consist of (i) a community of interest in the performance of the common purpose, (ii) joint control or right of control, (iii) a joint proprietary interest in the subject matter, (iv) a right to share in the profits, and (v) a duty to share in any losses which may be sustained.

Zolman Cavitch, 2-41 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 41.05 (2004).

It is true, as Respondents state, that "Shell and Texaco did not vanish and become absorbed in their new ventures." Opp. at 10. But this is scarcely remarkable; a joint venture *by definition* involves "joint control or right of control" by two or more parent entities. The transaction that Respondents describe would not be a joint venture formation at all – it would be a merger.

Respondents further argue that the presence of decision-making by the joint ventures as distinct entities is defeated by the fact that Equilon and Motiva were governed under the joint venture agreements by "Brand Management Protocols" that determined how the joint ventures could use the Texaco and Shell brands, and by a "Brand Management Council" that oversaw compliance with the Protocols. Opp. at 10, 11. Here again, such protective contractual provisions and such retention of supervisory control are ordinary incidents of joint venture formation, an essential element of which is "joint control or right of control." The same is true of the management powers vested in the Members Committees. Opp. at 11.

Respondents also point to the fact that the joint venture agreements included provisions that allowed for dissolution of the joint ventures at any time by mutual consent or unilaterally upon two years' notice after the first five years. The dissolution provisions further allowed Shell and Texaco to return to the downstream markets upon the dissolution of the joint ventures. Opp. at 10. But a contractual provision allowing for dissolution of a joint venture is a garden-variety element of a joint venture agreement:

> The duration of a joint adventure may be fixed by the terms of a contract between the parties or by mutual consent. If no date is fixed by the contract for its termination, the agreement remains in force until its purpose is accomplished or until such accomplishment has become impracticable or the venture is dissolved by any of the co-venturers.

Zolman Cavitch, 2-41 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 41.08 (2004).

Moreover, in the event that the joint ventures were to be dissolved, it would hardly be reasonable to require the venture partners to forswear returning to the markets they had previously been serving and in which they had heavily invested prior to the formation of the joint ventures.

The factors relied upon by Respondents simply indicate that Equilon and Motiva were indeed joint ventures. Thus, the question is properly presented: When a *bona fide* joint venture sells its own products and sets prices for those products, are its price-setting decisions to be treated as concerted action and *per se* illegal under Sherman Act § 1 simply because the joint venture is owned by companies that formerly competed in that market?

II. The Ruling Below, If Allowed To Stand, Would Open A Pandora's Box of Antitrust Liability For Joint Ventures.

By treating a *bona fide*, federally approved joint venture as, in essence, a cartel, the decision below creates the potential for antitrust liability – including criminal penalties – on the part of joint ventures and their executives in a variety of business contexts. Judge Fernandez noted in his dissenting opinion below,

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other business entity could. What could be more integral to the running of a business than setting a price for its goods and services?

Pet. App. 34a.

Section 1 of the Sherman Act has been interpreted to bar not only the joint setting of prices, but joint decision-making in the setting of *any* terms or conditions in the sale of a product – including financing, warranties, and the like. U.S. Dept. of Justice, 7 UNITED STATES ATTORNEYS' MANUAL: ANTITRUST RESOURCE MANUAL § 8 (1997). Thus, under the theory of Respondents and the Court of Appeals, a wide range of normal business decisions by a joint venture would be treated as unlawful collaborative action.

Where, as here, the claim is based on a joint venture having set the same prices for different product lines, the theory of Respondents and the Court of Appeals places the joint venture in a particularly difficult position. On one hand, Respondents see a *per se* violation of the Sherman Act based on the joint ventures having set the same prices for Shell and Texaco gasoline despite those labels having "different reputations and customer bases." Opp. at 19. Yet at the same time, the Robinson-Patman Act prohibits price discrimination among customers in the sale of products "of like grade and quality." 15 U.S.C. § 13(a). Respondents would thus have the joint ventures whipsawed between the requirements of the two statutes: barred from setting the *same* prices for two of its own product lines, yet barred from setting *different* prices for those products to the extent a court may deem them "of like grade and quality" even if not identical.

CONCLUSION

For the foregoing reasons and for the reasons stated by Petitioners, the Court should grant the petitions for certiorari.

Respectfully submitted,

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